Supreme Court, U.S.
FILED
MAR 2 1972
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1113

UNION CARBIDE CORPORATION,

Petitioner,

—against—

MARINA VOUTSIS,

Respondent,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID L. BENETAR
ARANOW, BRODSKY, BOHLINGER, BENETAR, EINHORN & DANN
469 Fifth Avenue
New York, New York 10017
Counsel for Petitioner

STANLEY SCHAIR
KATHRYN E. ZENOFF
Of Counsel

February 29, 1972

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
A. The Proceedings	4
B. The Facts	5
The Reasons for Granting a Writ	8
1. The decision below is in basic conflict with the statutory scheme for enforcement of Title VII of the Act and with decisions of other Courts of Appeals and district courts in other circuits construing the same	9
(a) Collateral Estoppel	11
(b) Election of Remedies	14
(c) Res Judicata	16
2. The decision below raises important questions of federal law which have not been, but should be, settled by this Court concerning the statutory scheme for enforcement of Title VII rights and its impact, if any, on the binding effect of voluntary settlements between the parties	18
Conclusion	20

PAGE

APPENDIXES:

A. United States Court of Appeals Opinion Below .. 1a

B. Pertinent Statutory Provisions of Title VII of the Civil Rights Act of 1964 ..... 10a

C. New York State Division of Human Rights Decision (January 18, 1972) 14a

D. Letter from Union Carbide Corporation's attorney to New York State Division of Human Rights (February 1, 1972) 20a

E. United States District Court Order, *Cooper* v. *Philip-Morris, Inc.*, Civil Action 6599 (D.C. Ky. 1971) 22a

Letter from United States District Court Judge in *Cooper* v. *Philip-Morris, Inc., supra* 24a

F. United States District Court Opinions Below

Opinion Dated December 7, 1970 ..... 28a

Opinion Dated January 11, 1971 ..... 36a

TABLE OF AUTHORITIES

Cases:

Airline Stewards and Stewardesses Association, Local 550 v. *American Airlines, Inc.*, —— F.2d ——, 4 FEP Cases 152 (7th Cir. 1972) 17

Bowe v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) 15

Braddy v. *Southern Bell T&T Co.*, —— F.2d ——, 4 FEP Cases 174 (5th Cir. 1972) 17

PAGE

Cooper v. *Philip Morris, Inc.*, Civil Action 6599 (D.C. Ky. 1971) 14, 16

Dewey v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 400 U.S. 1008 (1971), *aff'd per curiam without opinion*, 402 U.S. 689 ..... 11, 12, 13, 14, 16

EEOC v. *Local 780, Cement Masons' Union*, —— F. Supp. ——, 1 FEP Cases 189 (S.D.N.Y. 1967) 17

Edwards v. *North American Rockwell Corp.*, 291 F. Supp. 199 (C.D. Cal. 1968) 15

Fekete v. *United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970) 15

Hutchings v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970) 15

Lazard v. *Boeing Co.*, —— F. Supp. ——, 3 FEP Cases 643 (E.D. La. 1971) 15

Lopez v. *State Foundry & Machine, Inc.*, —— F. Supp. ——, 4 FEP Cases 158 (E.D. Wis. 1972) 16

Mack v. *General Electric Co.*, 329 F. Supp. 72 (E.D. Pa. 1971) 15

Newman v. *Avco Corp.*, —— F.2d ——, 3 FEP Cases 1137 (6th Cir. 1971) 13, 16

Oubichon v. *North American Rockwell Corp.*, 325 F. Supp. 1033 (C.D. Cal. 1970) 12, 15

Rios v. *Reynolds Metals Co.*, 332 F. Supp. 1209 (S.D. Tex. 1971) 15

Spann v. *Kaywood Div., Joanna Western Mills Co.*, 446 F.2d 120 (6th Cir. 1971) 11, 13, 14, 16

State Division of Human Rights v. *Union Carbide Corp.*, 35 A.D.2d 665, 315 N.Y.S.2d 401 (1st Dep't 1970) 6

State Division of Human Rights v. *Union Carbide Corp.*, 34 A.D.2d 636, 310 N.Y.S.2d 396 (1st Dep't 1970) 6

Tooles v. *Kellogg Co.*, —— F. Supp. ——, 4 FEP Cases 169 (D.C. Neb. 1972) 16

Washington v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D. Cal. 1968) 12, 14

Statutes:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ..... *passim*

Section 706(a) 10, 10a

Section 706(b) 7, 9, 10, 10a

Section 706(c) 9, 11a

Section 706(d) 12a

Section 706(e) 10, 12a

Section 706(i) 17, 13a

62 Stat. 928, 28 U.S.C. §1254(1) 2

New York Human Rights Law (Article 15, New York Executive Law) 5

Section 296.8 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

UNION CARBIDE CORPORATION,

Petitioner,

—against—

MARINA VOUTSIS,

Respondent,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Union Carbide Corporation,[1] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered and entered in this case on December 3, 1971.

The Opinions Below

The opinion of the Court of Appeals, not yet officially reported, appears in Appendix A hereto and is unofficially reported at 4 FEP Cases 74.

[1] Hereinafter "petitioner," "the Company," or "Carbide."

It reverses the decisions of the United States District Court for the Southern District of New York (Honorable Inzer B. Wyatt, J.), granting Carbide's motion for summary judgment and dismissing the complaint herein. The district court's initial decision, dated December 7, 1970, is reported at 321 F. Supp. 830 (S.D.N.Y. 1970); its opinion, dated January 11, 1971, granting rehearing and adhering to its original decision is reported at 321 F. Supp. 834 (S.D.N.Y. 1971). Both decisions appear at petitioner's Appendix F hereto.[2]

Jurisdiction

This petition for certiorari was filed within 90 days of the entry of the judgment of the Court of Appeals. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1).

Questions Presented

1. Did the court below err in reversing the district court's grant of summary judgment in favor of the Company and in rejecting the application of the doctrines of collateral estoppel, *res judicata* and election of remedies as bars to the Title VII action herein, where respondent Voutsis[3] in a proceeding initiated before the New York State Division of Human Rights ("Division") on an identical claim to that here asserted (a) voluntarily entered into an agreement with the Company under the auspices of the said Division settling said claim, (b) sought and ob-

[2] Also at pp. 3-12 of Appellant's Appendix below.

[3] Hereinafter "respondent," "Voutsis" or "complainant."

tained orders embodying and enforcing said settlement, (c) received tender of full compliance therewith by the Company, and (d) insisted and is still insisting on her State Division settlement and on broadening the enforcement order thereon entered by said Division?

2. Does Title VII confer upon the Equal Employment Opportunity Commission ("EEOC") (a) any rights in litigation commenced in federal court independent of or greater than those of the complainant, or (b) the power to vitiate, directly or indirectly, any settlement reached voluntarily by said complainant and her employer disposing of the underlying discrimination claim?

3. Under the scheme created by Congress in Title VII for the redress of complaints based on discrimination, may an employer who has reached a voluntary settlement with a complainant of such a complaint through the conciliation efforts and persuasion of a State antidiscrimination agency, thereafter be subjected to federal intervention in the form of proceedings before EEOC and the federal courts, where such federal intervention necessarily produces (a) duplicate jeopardy, (b) the expense of defending multiple actions, (c) the perpetuation of disputes whose final resolution is in the public interest and (d) a chilling effect on the conciliation processes and on the desire of an employer to reach a final settlement or other disposition of a discrimination claim at the State level?

Statutory Provisions Involved

The pertinent statutory provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ("the Act") are set forth verbatim in Appendix B hereto.

Statement of the Case

A. *The Proceedings*

This action was commenced on August 10, 1970, by Marina Voutsis. The complaint alleged sex discrimination by the Company in tenure and conditions of employment under Title VII of the Civil Rights Act of 1964. The Company thereupon moved to dismiss the complaint. Treating the Company's motion as one for summary judgment, the United States District Court for the Southern District of New York (Wyatt, J.) granted the motion on December 7, 1970. On the rehearing granted January 11, 1971, the court adhered to its initial determination.

Voutsis appealed to the Court of Appeals for the Second Circuit where EEOC was granted leave to intervene on March 12, 1971.[4] The Second Circuit on December 3, 1971, reversed the decision below and remanded the case for further proceedings. It, however, stayed the issuance of its mandate until February 15, 1972. Meanwhile, on January 18, 1972, the State Division handed down a decision enforcing a bi-party settlement of Voutsis' discrimination charge brought earlier before said Division.[5] The Company brought this new decision and other related developments[6] to the attention of the Court of Appeals by a motion for leave to enlarge its time to apply for rehearing and

---

[4] EEOC appeared as *amicus curiae* in the district court.

[5] The decision of January 18, 1972, appears at Appendix C hereto.

[6] As, for example, the Company's tender of full compliance with the Division's January 18, 1972, decision as set forth in its letter of February 1, 1972, a copy of which appears at Appendix D hereto.

simultaneously submitted therewith a petition for rehearing. The court denied the motion.

B. *The Facts*

The case now before this Court arose out of a complaint[7] filed on December 26, 1968, by Voutsis against Carbide with the New York State Division of Human Rights alleging that, in violation of the New York State Human Rights Law,[8] her request for an upgrading of position or promotion was refused by Carbide, and she was thereafter laid off, because of her sex. Thereafter on December 30, 1968, Voutsis submitted a similar charge against Carbide to EEOC under Title VII repeating the same allegations of sex discrimination.[9]

During the course of hearings before the State Division, and at the initiation and suggestion of Carbide, the parties to the State proceeding entered into a voluntary settlement of Voutsis' complaint on August 12, 1969.[10] On September 23, 1969, at the request of the parties, the stipulation of settlement was approved by and made a formal order of the Division's Commissioner, thereby disposing of Case No. Ib-C-119-68 and the claim upon which it was brought.

A dispute ensued as to whether Carbide had complied with the Commissioner's order and Voutsis' allegations of non-compliance were made the subject of a second com-

---

[7] No. Ib-C-119-68.

[8] Article 15, New York Executive Law (McKinney's Consolidated Laws 1971).

[9] EEOC file number TNY9-0385.

[10] The stipulation of settlement appears in Intervenor's Appendix C in the court below.

plaint before the State Division.[11] The matter of Carbide's claimed non-compliance had already been litigated in the New York State courts[12] and was before the Division itself on remand when the appeal herein was heard and decided by the Court of Appeals for the Second Circuit.

On January 18, 1972, after the decision of the Court of Appeals, the Division issued its own decision and order (Appendix C hereto). This order, while holding Carbide in violation of the settlement for the limited period between September 11 and November 19, 1969, in that the first position offered by the Company to Voutsis pursuant to the settlement did not comply therewith, adjudicated that the second position offered Voutsis on November 19, 1969, complied with the stipulated settlement and, therefore, Carbide was not in violation of the settlement on and after that date. Damages were awarded to Voutsis for two months' pay at the rate of $725 per month, less her earnings during said period of declared violation.

Carbide has since tendered full compliance with the decision and order of the State Division (Appendix D hereto). But Voutsis has filed and is prosecuting an appeal from said decision and order. *Thus, throughout the entire period of the federal court proceedings complainant has managed to keep this federal lawsuit in active litigation while simultaneously affirming and reaffirming that a valid,*

---

[11] No. Ia-C-5670. Breach of a settlement agreement is considered an independent violation of the State Human Rights Law (§296.8, New York Executive Law).

[12] *State Division of Human Rights* v. *Union Carbide Corp.*, 35 App. Div.2d 665, 315 N.Y.S.2d 401 (1st Dep't 1970); *State Division of Human Rights* v. *Union Carbide Corp.*, 34 App. Div.2d 636, 310 N.Y.S.2d 396 (1st Dep't 1970).

binding and enforceable settlement is in effect at the State level.

On the federal level, EEOC assumed jurisdiction over Voutsis' complaint on March 26, 1969 (Appellant's Appendix p. 53) and proceeded to conduct an investigation. On July 9, 1970, pursuant to Voutsis' request, EEOC issued a "Notice of Right to Sue Within 30 Days" (Appellant's Appendix p. 44).

After the grant of Voutsis' application for appointment of counsel, the instant action was commenced by her in the district court on August 10, 1970. That court granted summary judgment in favor of Carbide, holding that Voutsis had failed to wait the prescribed period of time before filing a charge of discrimination with EEOC after a prior filing with a State agency under Section 706(b) of Title VII and, accordingly, her filing with EEOC was ineffective and in violation of the statute. This defect was deemed jurisdictional, precluding further action on complainant's charge. The district court further ruled that the stipulation settling Marina's claim and the Commissioner's order based thereon barred the action in federal court under the doctrines of election of remedies and *res judicata*.

The Second Circuit reversed the district court decision and remanded the case for further proceedings. It concluded that the charge with EEOC was duly filed and that the action was not precluded by the doctrines of election of remedies, *res judicata* or collateral estoppel.

The Reasons for Granting a Writ

This case presents a fundamental question of construction arising under Title VII which is being litigated in one form or another in federal courts across the country and is being answered in a bewildering and often openly conflicting variety of ways. The question as specifically here presented is whether a complainant may file a charge of discrimination with a State agency, *voluntarily* enter into a settlement agreement with her employer under the auspices of that agency and thereupon—while actively seeking enforcement of the settlement made at the State level—proceed before EEOC and by federal court action to prosecute her claim as though her settlement contract had never been made. The essence of the question arises in other cases in the context of dispositions of claims of discrimination made (a) under grievance procedures provided by union contracts, (b) upon awards of arbitrators and (c) in a related, although not identical way, in cases involving decisions by State agencies where no settlement has been made.

The decision below, if left to stand, would in petitioner's view have consequences repugnant to the law and contrary to the spirit and intent of Title VII as it is written and as its history discloses. Legally it would subvert the long-settled principles that (1) parties to an agreement are mutually bound by their covenants, and that (2) the reciprocal reliance which such covenants invite estops unilateral abrogation thereof. In short, the Court of Appeals' decision would deny binding effect to settlements made under any auspices other than those of EEOC by guaranteeing a complainant's right to repudiate them at will.

In practice, the decision would discourage, if not effectively end, private settlements or other mutual arrangements for final and binding determinations of discrimination claims. In the end, it would have the result, unintended by Congress, of casting the full burden on the federal courts of almost all litigation on this subject—including litigation which might never have arisen were it not for the fact that dispositions which the parties had agreed to be final were denied the finality which the parties intended.

1. The decision below is in basic conflict with the statutory scheme for enforcement of Title VII of the Act and with decisions of other Courts of Appeals and district courts in other circuits construing the same.

The bill of the House of Representatives (HR 7152) which, in its final amended version, became the Civil Rights Act of 1964, did not originally contain any provision in Title VII for deferral to local or State proceedings involving identical claims of discrimination. It, however, was amended on the floor of the Senate to require prior resort to State and local law for the settlement of complaints involving discrimination. Thus, under Section 706 (b) of Title VII no federal proceedings may be commenced before the expiration of sixty days from the commencement of State proceedings (in a State which has a law prohibiting the unlawful employment practice alleged) or until after the termination of said State proceedings, whichever is sooner.[13]

[13] Title VII requires prior resort to local and State proceedings even in the case where the complaint is filed by a member of the EEOC as opposed to a private party. Section 706(c) of Title VII.

Further underscoring the significance which Congress attaches to the priority of State and local proceedings is the following language which appears in Section 706(e) of Title VII:

> "Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance."

Congress, as is in part indicated by this provision, has also attached major importance to the achievement of voluntary compliance in the enforcement of Title VII rights. Moreover, the enforcement procedures contained in Section 706 of Title VII itself rely in large measure on methods of conciliation and persuasion which are aimed at achieving such voluntary compliance. In subsection (a), EEOC's function is defined as eliminating unlawful employment practices by "informal methods of conference, conciliation, and persuasion."[14] And, in support of this function, EEOC is empowered to delay for an additional 60 days its issuance of a 30-day notice to commence a federal court action should it determine that "further efforts to secure voluntary compliance are warranted."[15]

In short, the legislative history of the Act and the Act itself indicate that Congress intended a scheme for enforcement of Title VII whereunder both prior resort to

---

[14] This provision also seeks to protect the parties against the use in subsequent proceedings of what was said or done by them during the conciliation stages, thereby encouraging the parties to explore the avenues of voluntary settlement and compliance more fully than they would otherwise.

[15] Under Section 706(e).

State and local agencies and to conciliation efforts are mandatory before the invocation of federal court jurisdiction.

Under such a statutory scheme, the legal force and effect to be accorded a voluntary settlement as the ultimate terminal point to a Title VII claim of discrimination would seem self evident and, whether reached in the context of a State, local or private forum (*e.g.*, grievance or arbitration), would seem plainly to bar a subsequent federal court action on the same claim. But the statute does not specifically spell out the legal effect of such a voluntary settlement or other consensually based disposition and this omission has resulted in a substantial volume of litigation producing conflicting decisions concerning the applicability or nonapplicability in a Title VII suit of the doctrines of *res judicata*, collateral estoppel and election of remedies.

(a) *Collateral Estoppel*

The Court of Appeals' decision in this case conflicts, we submit, with the statutory scheme for enforcement of Title VII as described above. It also conflicts with decisions of other Courts of Appeals and district courts in other circuits construing the enforcement provisions of Title VII and holding that the doctrines of collateral estoppel, *res judicata* and/or election of remedies bar subsequent federal suits where voluntary settlements or other consensually based dispositions of Title VII claims have been reached. See, *e.g.*, *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 400 U.S. 1008 (1971), *aff'd per curiam without opinion*, 402 U.S. 689 (4 to 4 decision); *Spann* v. *Kaywood Div., Joanna West-*

ern Mills Co., 446 F.2d 120 (6th Cir. 1971); *Washington* v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D. Cal. 1968); *Oubichon* v. *North American Rockwell Corp.*, 325 F. Supp. 1033 (C.D. Cal. 1970).

In *Dewey* v. *Reynolds Metals Co., supra,* plaintiff sued his employer under Title VII alleging he had been unlawfully discharged because of his religious beliefs. The suit was commenced after resort by plaintiff to the grievance-arbitration procedures contained in the collective bargaining agreement negotiated between his employer and bargaining representative. The precise religious discrimination claim made in the federal action had been submitted to a mutually agreed upon arbitrator and adjudicated adversely to the complainant. Reversing the district court below, the Sixth Circuit found that the Title VII action was barred by the prior adjudication in arbitration. The court held (429 F.2d at 332):

> "Where the grievances are based on an alleged civil rights violation and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> "This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, i.e., that the awards are binding on them but not on their employees."

The same language could be employed, *mutatis mutandis*, we submit, to describe the inevitable effect of the Court of Appeals decision herein on the inclination of employers to agree to voluntary settlements and compliance with regard to Title VII claims.

Dewey was followed in *Spann* v. *Kaywood Div., Joanna Western Mills Co., supra*, where the Sixth Circuit barred a Title VII racial discrimination suit. The complainant's discharge was made the subject of a grievance which was sent to arbitration. The arbitrator found for complainant, awarding him reinstatement but no back pay. After accepting reinstatement, complainant commenced proceedings first before the Michigan Civil Rights Commission and then before EEOC and in federal court in order to obtain the relief denied by the arbitrator, namely, back pay. Under these circumstances the Court held that the principles stated in *Dewey* required dismissal of the federal court action.

In *Newman* v. *Avco Corp.*, —— F.2d ——, 3 FEP Cases 1137 (6th Cir. 1971), the Sixth Circuit clearly defined and characterized the doctrine it was applying in *Dewey* and *Spann* as the doctrine of collateral estoppel. It held that a prior arbitration proceeding will bar a Title VII suit under this doctrine only where it can be shown that (1) the parties have agreed to resolve their grievances before a fair and impartial tribunal and (2) said tribunal had power to decide them. Since both the fairness of the arbitration proceeding and the power of the arbitrator to decide the discrimination issue under the labor contract involved therein were in dispute in *Newman*, the court refused to uphold the district court's grant of summary judgment.

A federal district court in Kentucky also has found the doctrine of collateral estoppel to be applicable in Title VII suits, holding that a prior State agency decision barred subsequent federal court proceedings. *Cooper* v. *Philip Morris, Inc.*, Civil Action 6599 (D.C. Ky. 1971) (copies of the court's order and of a letter to the parties setting forth the bases for the decision are appended hereto as Appendix E).

The existence of a voluntary settlement herein and the insistence on its enforcement by complainant present even a stronger case for application of the doctrine of collateral estoppel than did the existence of an arbitrator's award in *Dewey* and *Spann* and of a State agency decision in *Cooper*. Yet the Second Circuit, in direct conflict with the Sixth Circuit and the district court of Kentucky, held the doctrine inapplicable in the instant case.

(b) *Election of Remedies*

The Second Circuit's finding that the doctrine of election of remedies is inapplicable to Title VII plaintiffs also is in direct conflict with the decision of a California district court in *Washington* v. *Aerojet-General Corp., supra.* There a voluntary settlement was reached pursuant to contract grievance procedures, without the need for arbitration. The court in barring the subsequent federal court action under Title VII stated (282 F. Supp. at 523):

> "Initially he may pursue his remedies in both forums but at some point a choice must be made. This point, as in the case of concurrent jurisdiction between State and Federal courts, is reached when a litigant has pursued his remedies in one forum to *decision, be it by settlement, the decision of an arbitrator, or the*

decision of a judge. Such a rule is not only consonant with that applied in an analogous area, but also will contribute to the expeditious resolution of disputes in the equal employment area and promote the sound and equitable administration of justice by precluding an aggrieved party from subjecting a defendant to multiple actions based upon the same claim." (Emphasis supplied.)

In accord: *Edwards* v. *North American Rockwell Corp.*, 291 F. Supp. 199 (C.D. Cal. 1968); *Oubichon* v. *North American Rockwell Corp.*, 325 F. Supp. 1033 (C.D. Cal. 1970); *Rios* v. *Reynolds Metals Co.*, 332 F. Supp. 1209 (S.D. Tex. 1971).

Conflicts among the circuits on the issue of application of the election of remedies doctrine to cases involving grievance settlements and arbitration dispositions have produced substantial litigation and resulted in much confusion. At one end of the spectrum are the district court decisions just discussed which take the position that an election of remedies occurs when decision is reached in one forum. At the other end are the cases which, as in the Second Circuit decision herein, refuse to apply the doctrine at all to Title VII plaintiffs. *Fekete* v. *United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970); *Lazard* v. *Boeing Co.*, —— F. Supp. ——, 3 FEP Cases 643 (E.D. La. 1971); *Mack* v. *General Electric Co.*, 329 F. Supp. 72 (E.D. Pa. 1971). See also *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970), where application of the doctrine was considered doubtful.

Somewhere in between these poles is the Seventh Circuit's decision in *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711

(7th Cir. 1969), which permits a complainant to pursue arbitration and court prosecution under Title VII but requires an election of remedies "after adjudication" for the sole purpose of precluding duplicate relief.

(c) *Res Judicata*

The Second Circuit's refusal to bar the federal action herein under the doctrine of *res judicata* is in conflict with the reasoning of the Sixth Circuit in *Dewey, Spann* and *Newman* discussed herein at pages 11 to 14, *supra*. In *Newman* the court stated that the desire for "finality" which underlies *Dewey* and *Spann* is best expressed in the themes of *res judicata* and collateral estoppel and not in election of remedies. 3 FEP Cases at 1140, n. 1.

An analogous area in which questions relating to the application of the doctrines of *res judicata*, collateral estoppel and election of remedies often have been raised concerns the legal impact of a State agency decision on the ability of a complainant to pursue a subsequent federal action on the same claim under Title VII. The district court of Nebraska has, in dicta, taken the position that the doctrine of *res judicata* is applicable where the State's possible relief "approximated" that of the federal statute. *Tooles* v. *Kellogg Co.*, —— F. Supp. ——, 4 FEP Cases 169 (D.C. Neb. 1972); see also *Lopez* v. *State Foundry & Machine, Inc.*, —— F. Supp. ——, 4 FEP Cases 158 (E.D. Wis. 1972) (voluntary settlement in State proceeding). In *Cooper* v. *Philip Morris, Inc.*, Civil Action 6599 (D.C. Ky. 1971),[16] the court dismissed a Title VII complaint on the theory of *res judicata*, as well as election of remedies and collateral

[16] See Appendix E hereto.

estoppel, where the plaintiffs had pursued their claims to conclusion before the Kentucky Commission on Human Rights and thereafter sought further remedies under Title VII. These decisions conflict with an earlier New York district court decision in *EEOC* v. *Local 780, Cement Masons' Union*, —— F. Supp. ——, 1 FEP Cases 189 (S.D.N.Y. 1967).

The decision below, to the extent that it denies, as a matter of law, the power of the disputing parties to enter into a binding and dispute-ending settlement without the approval of EEOC, is also in conflict with decisions of the Seventh Circuit and Fifth Circuit. See *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, —— F.2d ——, 4 FEP Cases 152 (7th Cir. 1972) (EEOC intervention denied on grounds that parties were adequately represented by counsel and EEOC's role held limited by §706(i) to efforts to insure compliance with court orders and does *not* extend to monitoring remedies in private Title VII cases) and *Braddy* v. *Southern Bell T&T Co.*, —— F.2d ——, 4 FEP Cases 174 (5th Cir. 1972) (EEOC cannot intervene in a federal suit as a party to oppose a voluntary settlement).

In the former case the Seventh Circuit concluded (at 157-58):

> "Finally, the Commission asserts that the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated. This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII. Suffice it to say that as a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within

the confines of Title VII where 'there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation.' *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). See *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969)."

2. The decision below raises important questions of federal law which have not been, but should be, settled by this Court concerning the statutory scheme for enforcement of Title VII rights and its impact, if any, on the binding effect of voluntary settlements between the parties.

As we have seen, Title VII of the Civil Rights Act of 1964 provides a scheme for federal redress of discriminatory employment practices based on race, color, religion, sex or national origin, but the statute requires prior resort to State or local fair employment practices agencies, where available,[17] and mandates conciliation efforts prior to litigation in order to achieve private settlement or voluntary compliance.[18] The scheme for enforcement of Title VII and the relevant legislative history manifest, we submit, a Congressional intent to provide a federal judicial forum in Title VII disputes *only* where prior efforts to achieve voluntary settlement and a State or local remedy have failed.

The need for guidelines in this area, however, is shown quite clearly by the sheer volume of cases dealing with the issues presented herein. And, as we have previously shown, both the results and the rationale of the courts in

[17] Section 706(b) and (c).

[18] Section 706(a) and (e).

reaching their decisions in these cases are diverse and often in direct conflict with each other.

The swelling volume of litigation on this subject and the unsettling effects of the conflicting decisions resulting therefrom are not all that lend urgency to the granting of certiorari. Also at issue are: (1) The effective and fair administration of Title VII; (2) whether Congress intended to encourage forum shopping efforts to better the results of voluntarily settled claims; (3) the importance of the efficient use of judicial machinery; (4) whether, and to what extent, employers should be subjected to the expense of defending multiple actions in several forums and be exposed to the resulting multiple jeopardy; (5) the abolition in a restricted class of cases (*i.e.*, Title VII cases) of the deeply entrenched legal doctrines respecting the finality of disputes and litigation (*i.e.*, *res judicata*, collateral estoppel and election of remedies, and (6) the perpetuation of disputes whose final resolution is in the public interest.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DAVID L. BENETAR
ARANOW, BRODSKY, BOHLINGER,
BENETAR, EINHORN & DANN
469 Fifth Avenue
New York, New York 10017
Counsel for Petitioner

STANLEY SCHAIR
KATHRYN E. ZENOFF
Of Counsel

February 29, 1972

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—September Term, 1971.

(Argued October 26, 1971 Decided December 3, 1971.)

Docket No. 71-1359

MARINA VOUTSIS,

Plaintiff-Appellant,

—v.—

UNION CARBIDE CORPORATION,

Defendant-Appellee.

Before LUMBARD, FEINBERG and OAKES, *Circuit Judges.*

Appeal from summary judgment in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* dismissing plaintiff's employment discrimination claim under Title VII of the Civil Rights Act of 1964 on the basis of failure to state a claim and election of remedies and/or res judicata.

Reversed.

ARTHUR S. OLICK, New York, New York (David S. Lande, Kreindler, Relkin, Olick & Goldberg, New York, New York, of counsel), *for Plaintiff-Appellant.*

WILLIAM C. TREANOR, New York, New York (Richard P. Lawlor, New York, New York, of counsel), *for Defendant-Appellee.*

JOHN DEJ. PEMBERTON, JR., Deputy General Counsel, Washington, D. C. (Stanley P. Hebert, General Counsel, Julia P. Cooper, Chief, Appellate Section, John F. Goemaat, Attorney, Equal Employment Opportunity Commission, Washington, D. C., of counsel), *for Intervenor Equal Employment Opportunity Commission.*

OAKES, *Circuit Judge*:

Appellant, Marina Voutsis, a former employee of appellee, Union Carbide, appeals from the dismissal of her complaint charging appellee with sex discrimination. The summary judgment dismissal was for failure to state a claim because appellant had filed her complaint with intervenor United States Equal Employment Opportunity Commission (hereinafter EEOC) too *soon,* that is, before the expiration of the 60-day period prescribed for deferral to state administrative and judicial proceedings in 42 U.S.C. §2000e-5(b), and on the further ground that she had foreclosed federal action by electing to pursue her state remedies by entering into, and was bound by, "a settlement" with Union Carbide in the state proceedings. The opinion below, reaffirmed in a rehearing and reported at 321 F. Supp. 830, 834 (S.D.N.Y. 1970), relied on *Washington* v. *Aerojet-General Corp.,* 282 F. Supp. 517 (C.D. Cal. 1968), and on *Love* v. *Pullman Co.,* 430 F.2d 49, *aff'd on rehearing,* 430 F.2d at 56-58 (10th Cir. 1970), *cert. granted,* 401 U.S. 907 (1971).

The act of Congress here involved is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, the "Equal Employment Opportunities" subchapter of the Act. The

enforcement provisions of the Act contained in Section 706, 42 U.S.C. §2000e-5(b), provide in pertinent part:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

The rather stormy Senate debate[1] leading up to the passage of the Act made it plain that, as a compromise,[2] Congress

---

[1] See, *e.g.*, statement of Senator Richard Russell, quoted in 2 Schwartz, Statutory History of the United States: Civil Rights 1146 (1970) (hereinafter cited as Schwartz): "They [the Commission inspectors] would be in the office of every businessman in this country, harassing and spying and prying into his individual business." Or, see statement of Senator John Tower, quoted in Schwartz at 1298: "The FEPC would subject a great part of American industry to bureaucratic whims, prejudices and caprices to a degree never before contemplated."

[2] See statement of Senator Joseph Clark, quoted in Schwartz at 1328-29:

> First I wish to state my own candid political judgment, which is that if we want any bill at all enacted, we must take the Dirksen amendment. . . . The able, articulate, and indefatigable Members of the Senate who are opposed to any civil rights bill, and who have been filibustering the civil rights bill . . . . are indeed tireless. . . . Since I wish a bill, and want the bill desperately, I have concluded to swallow my doubts and disappointments and to support the compromise. . . .

(*continued on following page*)

was seeking "to give States . . . a reasonable opportunity to act under State law before the commencement of any Federal proceedings by individuals who allege discrimination."[3] A search of the debates, however, has failed to shed any light on the question whether the words "no charge may be filed" were intended to be construed literally as the trial court felt bound to do, or whether a more reasonable construction was intended, requiring only that federal authorities defer to state proceedings for a limited period of time in order to give the state or local agency "an opportunity to handle the problem under State or local law."[4]

We agree with Judge Fahy, dissenting in *Love* v. *Pullman Co., supra* at 54, and with District Judge MacBride, in *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968), that the intent of Title VII is remedial and that plaintiffs under it should not be held accountable for a procedural prescience that would have

---

Senator Everett Dirksen had previously complained:

> What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim? Schwartz at 1177.

The compromise, which was worked out in conferences between Senators Dirksen, Mansfield, Kuchel and Humphrey (Schwartz at 1332), made parallel "important changes" in the enforcement provisions of Title II (Public Accommodations) and Title VII. See statement of Senator Hubert Humphrey quoted in Schwartz at 1334.

[3] Statement of Senator Hubert Humphrey quoted in Schwartz at 1334.

[4] Statement of Senator Hubert Humphrey quoted in Schwartz at 1347; *see also* 110 Cong. Rec. 12725 (1964).

made a Baron Parke happy or a Joseph Chitty proud. See also *Local 5, IBEW* v. *EEOC*, 398 F.2d 248, 249 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

Our conclusion that the complaint was properly filed pursuant to the statute is made easier by the EEOC regulation.[5] Under the regulation, a copy of a complaint filed prematurely with the Commission is promptly transmitted to the appropriate local or state agency,[6] while the complaint itself is held by the EEOC until termination of the local or state proceedings or the lapse of the 60-day statutory waiting period, whichever occurs first, and then it is considered to be filed. An interpretation of this nature, made by the agency charged with Title VII enforcement, is to be accorded considerable deference by the courts. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). As was said in a case involving Title II (Public Accommodations) of the 1964 Act, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968), "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." To place an unnecessary stumbling block in the private litigant's path, particularly when the national enforcement agency has carried out the federal mandate of accommodation to state action, would be

---

[5] 29 C.F.R. §1601.12.

[6] Here plaintiff filed a similar charge with the state agency before coming to the federal agency so that it was, strictly speaking, not necessary to transmit a copy to the state agency; apparently one was transmitted nevertheless.

hypertechnical and overly legalistic,[7] and would improperly shield a discriminatory organization from the reach of civil litigation. Cf. *Rosen* v. *Public Service Electric & Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969).[8]

Nor do we find that appellant elected to pursue state remedies exclusively by entering into a "settlement" with the employer in the state action. In the "settlement" of August 12, 1969, appellee agreed to "offer to the complainant within 30 days after the date of this stipulation the opportunity to accept employment in a non-exempt, non-routine administrative position with higher pay points

---

[7] Lack of verification in a complaint under Title VII has been held to be a technical rather than a jurisdictional defect. *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 360 (7th Cir. 1968). An informal letter has been held to constitute a charge under Title VII filed within the time limitation period. *Georgia Power Co.* v. *EEOC*, 412 F.2d 462, 466 (5th Cir. 1969).

[8] Most other federal courts that have faced the problems of deferral and technical procedures agree with our flexible interpretation. See, e.g., *Local 5, IBEW* v. *EEOC*, 398 F.2d 248, 249, 252 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); *Nishiyama* v. *North American Rockwell Corp.*, 49 F.R.D. 288, 291 (C.D. Cal. 1970); *Fix* v. *Swinerton & Walberg Co.*, 320 F. Supp. 58, 59 (D. Colo. 1970); *Bremer* v. *St. Louis S.W. R.R.*, 310 F. Supp. 1333, 1338-39 (E.D. Mo. 1969); *Vigil* v. *American Tel. & Tel. Co.*, 305 F. Supp. 44, 46 (D. Colo. 1969); *Everett* v. *Trans-World Airlines*, 298 F. Supp. 1029 (W.D. Mo. 1969). Only the other day this court read the procedural provisions of the Social Security Act broadly, avoiding a hypertechnical interpretation of that statute. *Widermann* v. *Richardson*, Docket No. 71-1777 (2d Cir. Nov. 10, 1971).

Washington v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D. Cal. 1968), a contrary decision relied upon by the district court below, in turn relied upon a 1965 opinion of the General Counsel of the EEOC. That opinion has long since been rendered obsolete by the Commission regulations referred to in this opinion; in addition such an opinion is not to be considered, according to the EEOC itself, a "written interpretation or opinion of the Commission" under Section 713(b) of Title VII, 42 U.S.C. §2000e-12(b). 35 Fed. Reg. 18692 (1970). Moreover, the same district judge who decided *Washington* clarified it in *Nishiyama, supra*, favorably noting *Vigil, supra*, which closely parallels this case.

and a higher salary level conforming to similar assignments within Union Carbide . . . ." This vague "settlement" left open a number of questions—*e.g.*, what is a "non-routine administrative position"—which have yet to be finally answered in the New York State proceedings, despite two appeals and an elapsed time of more than two years. *State Division of Human Rigts* v. *Union Carbide Corp.*, 35 App. Div. 2d 664, —— N.Y.S.2d —— (1st Dep't 1970); *State Division of Human Rights* v. *Union Carbide Corp.*, 34 App. Div. 2d 636, 310 N.Y.S.2d 396 (1st Dep't 1970). We understand that the case is again before the Division of Human Rights, on remand from the Appellate Division, for the purpose of making a record appropriate for judicial scrutiny.

The Congressional policy here sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and cumulative, cf. *Vaca* v. *Sipes*, 386 U.S. 171, 177-80 (1967), and it facilitates comprehensive relief, *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) (class action permissible). While plaintiff may ultimately achieve some individual relief in the state proceedings which might bar her from duplicate relief here, *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), the federal claim allows the district court to conduct a "full scale inquiry into the charged unlawful motivation in employment practices," *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968), and to award broad relief, perhaps for the entire class of employees of which appellant is a member.[9] See Section

[9] See *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 30, 32-33 (5th Cir. 1968). The allegations of plaintiff's complaint are phrased in class terms.

706(a), 42 U.S.C. §2000e-5(a) (" . . . the Commission shall endeavor to *eliminate* any such alleged unlawful employment practice . . . ") (emphasis supplied), and Section 706 (g), 42 U.S.C. §2000e-5(g) (" . . . the court may . . . order such affirmative action as may be appropriate . . . "). The "harsh" and "technical" procedural rule of election of remedies, *Great American Insurance Co.* v. *Merchants & Manufacturers Mutual Insurance Co.*, 423 F.2d 1143, 1146 (6th Cir. 1970), is not applicable to a Title VII civil rights plaintiff, because the purposes underlying enactment of that Title were clearly based on the Congressional recognition that " . . . state and local FEPC laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. Big interstate industry cannot effectively be handled by the States."[10] The system of remedies is a complementary one, with the federal remedy designed to be available after the state remedy has been tried without producing speedy results.

We also agree with the conclusion of the Fifth, Sixth and Eighth Circuits that the doctrines of res judicata and collateral estoppel do not bar appellant as a matter of law. *Tipler* v. *E. I. DuPont de Nemours & Co.*, 443 F.2d 125 (6th Cir. 1971) (prior determination by NLRB); *Taylor* v. *Armco Steel Co.*, 429 F.2d 498 (5th Cir. 1970) (judicial determination prior to Civil Rights Act); *Hutchings* v. *United States*, 428 F.2d 303 (5th Cir. 1970) (arbitration award);

---

[10] Statement of Senator Joseph Clark, quoted in Schwartz at 1290. And see the statement of Senator Hubert Humphrey who, in explaining the changes in the Dirksen-Mansfield compromise, said: "Moreover, section 706(d) is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to State or local authority." Schwartz at 1352.

Norman v. *Missouri Pacific R.R.*, 414 F.2d 73 (8th Cir. 1969) (judicial determination under Railway Labor Act). But see *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam without opinion*, 402 U.S. 689 (1971) (4-4 decision) (arbitration award interpreting collective bargaining contract).[11]

We express no opinion, however, on the question whether appellant could, without the federal commission's consent, bind herself to a settlement after filing her federal complaint. Cf. *D. A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946); see 29 C.F.R. §1601.9 (EEOC consent required to withdraw suit). Suffice it to say here that no settlement has been effectuated with or without EEOC consent.

We reverse and remand, with instructions to the district court to proceed in an expeditious manner in accordance with this opinion.

Voutsis v. *Union Carbide*

I concur.
JEL

November 30, 1971

Voutsis v. *Union Carbide*

I concur.
WF
Nov. 26, 1971

[11] Cases such as *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), relied upon by appellee, involve private rights in ordinary civil actions, not the public policy of Title VII.

APPENDIX B

The pertinent provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*) are as follows:

Sec. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a

State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement it sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effec-

tive day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may au-

thorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

* * * * *

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

APPENDIX C

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. CS-17508-69
C-20437-70

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

MARINA VOUTSIS,

Complainant,

—against—

UNION CARBIDE CORP.,

Respondent.

PROCEEDINGS IN THE CASE

On or about December 26, 1968, the above-named Complainant filed a complaint, No. CS-17508-69, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

On August 12, 1969, in the course of a public hearing on the aforementioned complaint, the parties entered into a stipulation of settlement.

On or about March 16, 1970, Complainant filed another complaint No. C-20437-70, against Respondent, alleging that the stipulation of settlement of August 12, 1969, had been violated by Respondent.

After investigation, the Division found that it had jurisdiction over the latter complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the hearing was held on May 27, June 14, June 15, June 21, and July 30, 1971, before Norman Mednick, a Hearing Examiner of the Division.

At the hearing, the Complainant and Respondent appeared. Complainant was represented by Kreindler, Relkin, Olick & Goldberg, Esqs., by Arthur S. Olick, Esq., of Counsel. Respondent was represented by Richard P. Lawlor, Esq. The Division was represented by Henry Spitz, Esq., General Counsel, by Ann Thacher Anderson, Esq., of Counsel.

Prior to the commencement of the hearing, on May 11, 1971, Respondent moved for a consolidated hearing to determine whether the stipulation of settlement of August 12, 1969, and as alleged in complaint No. C-20437-70, had been violated. On May 27, 1971, the motion was granted.

Findings of Fact

1. The stipulation of settlement of August 12, 1969, in pertinent part, provides, as follows:

> "2. That the respondents shall offer to the complainant within 30 days after the date of this stipulation the opportunity to accept employment in a non-exempt, non-routine administrative position with high-

er hay points and a higher salary level conforming to similar assignments within Union Carbide, growth opportunity to exempt level either in the job or in its environs within a reasonable period of time under normal business circumstances in a position commensurate with her capabilities, experience and interests. Seniority and other employee rights, advantages, privileges and benefits are to be restored to the Complainant as of July 31, 1968, the date upon which the Complainant's employment with the Respondent ceased. No benefits of employees will be withheld from the Complainant because of sex."

2. The last position Complainant held with Respondent was that of Secretary III, a position rating 98 hay points and a salary of $635 per month.

3. The hay system is an internal job evaluation program constructed for Respondent by Hay Associates, management consultants.

4. On or about September 18, 1969, Respondent offered Complainant the position of Secretarial Assistant, a position rating 102 hay points and a salary of $685 per month.

5. On or about September 16, 1969, Respondent prepared a job description for the position Secretarial Assistant, which job description provided that "The secretarial responsibilities represent the most important aspect of this job and account for 60% of employee's time and the remainder of the time is spent in other described activities."

6. The total job activities for the said position were classified as: secretarial, chart preparation, literature re-

search, statistical analysis, report editing, and preparation for conferences and meetings.

7. On or about November 19, 1969, Respondent offered Complainant the position of Training Assistant, a position rating 110 hay points and a salary of $725 per month, the job description of which was prepared on or about November 17, 1969.

8. Complainant declined to accept either position on the ground that "neither conformed to the requirements of the stipulation that the position offered be 'non-exempt, non-routine administrative (with) growth opportunity to exempt level either in the job or in its environs within a reasonable period of time . . .'"

9. Although the stipulation of settlement is silent as to the meaning of the terms "non-exempt" and "non-routine administrative," there is sufficient evidence in the record to show that the parties contemplated a position subject to the Federal Fair Labor Standards Act.

10. Section 213 of the Fair Labor Standards Act, in part, provides that administrative positions are exempt from the coverage of the Act.

11. A position described as "non-exempt" means that such position would be covered by the Act.

12. A position described as "administrative" means that such position would not be covered by the Act.

13. Since it was the intention of the parties to the stipulation that the position offered by Respondent to Complain-

ant be subject to the Act, such position would have to be "non-exempt" (covered) with some "administrative" duties, responsibilities and functions attached to it.

14. If Complainant were under the stipulation, to be given a purely administrative position, she would then have been in the "exempt" classification, and the provision in the stipulation that the position to be offered shall have "growth opportunity to exempt level" would not have been necessary.

15. I find that the position of Secretarial Assistant did not call for the exercise of discretion and independent judgment and possessed hardly any administrative duties, responsibilities, or functions.

16. I find that the position of Training Assistant did, in part, call for the exercise of discretion and independent judgment and did possess administrative duties, responsibilities and functions with "growth opportunity" to have enabled Complainant to move into an "exempt level" position and, further, that such position was not one excluded from consideration by the parties to the stipulation.

17. I find that from September 11, 1969, the date Respondent was to have offered Complainant a position under the terms of the stipulation, to November 19, 1969, when Respondent offered Complainant the position of Training Assistant, Respondent was in violation of the stipulation.

18. I find that Complainant was damaged during the period of such violation.

Decision

On the basis of the foregoing, I find that Respondent was in violation of the stipulation of settlement of August 12, 1969, during the period September 11, 1969, up to, but not including November 19, 1969.

I further find that Respondent was not in violation of the stipulation of settlement of August 12, 1969, from on and after November 19, 1969.

I further find that the awarding of damages to Complainant for the period during which Respondent was in violation of the said stipulation will effectuate the purposes of the Human Rights Law.

Order

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

Ordered that from and after November 19, 1969, Respondent be held not to have violated the stipulation of settlement of August 12, 1969; and it is further

Ordered, that for the period September 11, 1969, to and including November 18, 1969, Respondent shall pay, as damages, to Complainant a sum of money computed on the basis of $725 per month, less Complainant's earnings from employment during such period.

Dated: January 18, 1972
New York, New York

State Division of Human Rights
Jack M. Sable
Commissioner

APPENDIX D

RICHARD P. LAWLOR
COUNSELOR AT LAW
270 PARK AVENUE
NEW YORK, N. Y. 10017

551-2301

February 1, 1972

The Honorable Florence V. Lucas,
Assistant Commissioner
State of New York, Executive Department
Division of Human Rights
270 Broadway
New York, New York 10007

Re: Voutsis v. Union Carbide Corporation
Cases Nos.: CS-17508-69
C-20437-70

Dear Commissioner Lucas:

I have received the Findings of Fact, the Decision and the Order of Commissioner Sable in the above-referenced matters. After review, Union Carbide Corporation has decided not to appeal from that part of the Decision and Order adverse to it.

Union Carbide Corporation is ready and willing to tender the computed amount of damages as ordered. Therefore, I

await your instructions on when, how much, and in what form Respondent is to fulfill its obligation under the Order.

Very truly yours,

RICHARD P. LAWLOR
Attorney for
Union Carbide Corporation

RPL:mk

cc: Mrs. Ann T. Anderson
Arthur Olick, Esq.

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

LOUISVILLE DIVISION

Civil Action No. 6599

AMANDA COOPER, *et al.*,

—v.—

PHILIP MORRIS INCORPORATED, *et al.*,

ORDER

The defendants, Philip Morris Incorporated and Tobacco Workers International Union, Local No. 16, having filed motions to dismiss the complaint of the plaintiffs herein and the Court having considered the pleadings, supporting affidavit and exhibits thereto of record and the briefs of all parties; the Court having, therefore, treated said motions as motions for summary judgment under Rule 56; and the Court being sufficiently advised, it is hereby ordered that the motion of Philip Morris for summary judgment be and the same is hereby SUSTAINED; that the motion of Local No. 16 for summary judgment be and the same is hereby SUSTAINED to the extent it relates to the civil rights claims of the plaintiffs; and that the motion of Local No. 16 for summary judgment be and the same is hereby

DENIED to the extent it relates to the claim of the plaintiffs of a violation of the duty of fair representation.

It is further ordered that successful parties jointly prepare and submit proposed memorandum opinion or findings of fact and conclusions of law, and a proposed Judgment, with copies thereof to all counsel, in conformity with the foregoing.

June 17th, 1971

/s/ JAMES F. GORDON
James F. Gordon
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Louisville, Kentucky 40202

June 17, 1971

Honorable Martin Roach
Tarrant, Combs, Blackwell & Bullitt
Kentucky Home Life Building
Louisville, Kentucky 40202

Honorable Neville Tucker
Attorney-at-Law
3308 West Broadway
Louisville, Kentucky 40211

Honorable Darryl T. Owens
Attorney-at-Law
1300 West Broadway
Louisville, Kentucky 40203

Honorable Herbert L. Segal
Attorney-at-Law
Republic Building
Louisville, Kentucky 40202

Honorable Susan Deller Ross
Attorney-at-Law
Equal Opportunity Employment Commission
Office of General Counsel
Washington, D. C.

Honorable Jack Greenberg
NAACP, Legal Defense & Educational Fund, Inc.
10 Columbus Circle, Suite 3020
New York, N. Y. 10019

Re: COOPER, *et al.* v. PHILIP MORRIS, *et al.*
Civil Action No. 6599
United States District Court
Western District of Kentucky

Gentlemen:

This matter has come on before the Court on the motions of the defendants, Philip Morris Incorporated and Tobacco Workers International Union, Local No. 16, to dismiss the Complaint of the plaintiffs herein. In addition to the pleadings the Court has also considered the supporting affidavit and exhibits thereto, including the Findings of Fact, Conclusions of Law and Order of the Kentucky Commission on Human Rights and the transcript in the proceedings before that Commission styled Case No. 103-E, *Carrie Lee Carr, et al.* v. *Philip Morris Incorporated, et al.*, and the Court treats these motions as motions for Summary Judgment under Rule 56.

Enclosed is an Order entered today sustaining the motion of Philip Morris; sustaining the motion of Local No. 16 insofar as it relates to the issue of violation of the civil rights of the plaintiffs on account of racial discrimination; and denying the motion of Local No. 16 insofar as it relates to the issue of violation by Local No. 16 of the duty of fair representation on the ground that the record as now constituted is insufficient to enable the Court to dispose of the fair representation issue under Rule 56. Such denial is without prejudice to the right of Local No. 16 to renew its motion in the future, and the Court retains jurisdiction of this action with respect to and for further hearings on the Plaintiffs' allegations that Local No. 16 has violated its duty of fair representation.

Philip Morris and Local No. 16 are directed to jointly prepare and tender, with copies to all counsel, a proposed Memorandum Opinion, or Findings of Facts and Conclusions of Law, and a proposed Judgment in conformity with the foregoing and the following:

1. Title VII of the Civil Rights Act of 1964 expressly provides for non-preemption of state laws. The issues raised and the relief sought here were fully adjudicated in the state tribunal under the Kentucky law. That determination was not appealed. *Res judicata* is applicable here as well as collateral estoppel.

2. The plaintiffs could have insisted on proceeding under the federal statutes 60 days after filing their charges with the State Commission. Instead they chose to delay invoking federal jurisdiction for over a year during which time they litigated their claims in full under the state law. They do not assail the fairness of the hearing they received before the state tribunal. Under these circumstances they must be bound by the decision of the forum they elected to proceed before.

3. The Court believes that the wise exercise of judicial discretion dictates that it abstain from exercising jurisdiction in this case. The considerations leading to this conclusion are the following:

The Kentucky Civil Rights Act is structured to carry out the national policy embodied in Title VII. The issues involved here were adjudicated in accordance with the procedures provided by the Kentucky law. The Commission conducted an investigation, issued a Complaint and retained counsel to prosecute it. Pre-hearing depositions of the defendants representatives were taken. The issues

were thoroughly aired at a hearing before the Commission which extended over a period of five days. During all of these proceedings plaintiffs were represented by counsel of their own choosing as well as by counsel for the Commission.

It would be an improvident expenditure of time, money and judicial manpower to relitigate the same issues in this Court. Relitigation would undermine the effectiveness of the Kentucky Civil Rights Act. In addition, the Order of the tribunal granting retroactive seniority has been implemented and it would be extremely difficult, if not impossible, to restore the defendants and other employees of Philip Morris affected by such seniority adjustments to the status quo ante.

Further, the parties will find attached hereto an Order for a pretrial conference to be held in this matter at the hour of 1:30 P.M., Friday, July 9, 1971, in the Court's chambers in Louisville, Kentucky. The purpose for such to be to ascertain the desires of the parties relative to proceeding in this action at this time to a trial as to the issue of violation by Local 16 of the duty of fair representation.

Yours truly,

/s/ JAMES F. GORDON
James F. Gordon
United States District Judge

JFG/ddt
Enclosures

APPENDIX F

Opinion Dated December 7, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3435

MARINA VOUTSIS,

Plaintiff,

—against—

UNION CARBIDE CORPORATION,

Defendant.

Appearances:

ARTHUR S. OLICK, Esq.
Attorney for Plaintiff
230 Park Avenue
New York, New York 10017

WILLIAM C. TREANOR, Esq.
Attorney for Defendant
270 Park Avenue
New York, New York 10017

ROBERT FITZPATRICK, Esq.
Attorney for Equal Employment Opportunity Commission, Amicus Curiae
1800 G Street, N.W.
Washington, D. C. 20506

WYATT, *District Judge,*

This is a motion by defendant (Carbide) for an order dismissing the action because the complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)) or, in the alternative, for a stay of further proceedings herein for 60 days pending termination of proceedings between the parties in the New York Supreme Court:

The action is brought under the "Equal Employment Opportunities" subchapter of the Civil Rights Act of 1964 (42 U.S.C. § 2000e and following). The complaint avers in substance that plaintiff (Marina) was employed by Carbide for 22 years and always rated good to outstanding; that Marina became "Senior Secretary to the General Manager of Linde Personnel services"; that she performed many administrative functions normally done by men in the organization; that she sought promotion to a "staff-level assignment" but was refused promotion because she is a woman and at Carbide "staff-level" is only for men; that then all her administrative functions were taken away and reassigned to "staff-level" men; that because she sought promotion she was reassigned to clerical duties on a lower level than that on which she had been; and that because she refused to be "down-graded and demoted" she was fired by Carbide on July 31, 1968. The complaint asserts that Carbide engaged in unlawful employment practices by discriminating against Marina and other women and by classifying its employees because of sex, all in violation of 42 U.S.C. § 2000e-2. The principal relief sought is for a declaratory judgment, for a preliminary and a permanent injunction, and for back pay (see 42 U.S.C. § 2000e-5(g)).

Jurisdiction is asserted under 42 U.S.C. § 2000e-5(f) and also under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

Affidavits were submitted and are considered; the motion may be treated as one for summary judgment. Fed. R. Civ. P. 12(b).

The following appears without dispute.

On December 26, 1968, Marina filed a complaint against Carbide with the New York Division of Human Rights (the Division). N.Y. Executive Law §§ 293, 297(1). The complaint was of an "unlawful discriminatory practice" by Carbide because of the sex of Marina. N.Y. Executive Law § 296(1)(a).

On December 30, 1968, Marina filed a written charge against Carbide with the Equal Employment Opportunity Commission (EEOC).

The Division found probable cause to believe that Carbide was engaging in an unlawful discriminatory practice. N.Y. Executive Law § 297(2).

On or about May 27, 1969, the Division apparently served a "written notice" requiring Carbide to answer the complaint and to appear at a public hearing. N.Y. Executive Law § 297(4)(a).

Thereafter, in the Division proceedings, Carbide and Marina (as "complainant") executed what was called a "stipulation of settlement" ("conciliation agreement" is the term used in the state law, N.Y. Executive Law § 297), dated August 12, 1969. This stipulation was made an order of the commissioner (head of the Division; N.Y. Executive Law § 293(1)) on September 23, 1969.

The Division then determined that Carbide had not complied with the terms of the stipulation.

The Division filed a petition in the Appellate Division, First Department, to enforce the September 23, 1969 order of the Commissioner. N.Y. Executive Law § 298.

On April 23, 1970, the Appellate Division denied the petition and remanded the matter to the Division "for the purpose of making an appropriate record of the claimed noncompliance with findings thereon". *State Div. Of Human Rights* v. *Union Carbide Corp.*, 34 A.D.2d 636, 310 N.Y.S.2d 396.

What, if anything, EEOC did about the charge of Marina filed with it on December 30, 1968 does not appear.

Under date of June 9, 1970, however, it sent to Marina a "notice of right to sue within 30 days". Presumably this was meant to be the "so notify" provided for in 42 U.S.C. § 2000e-5(e), but the "notice" as sent had no statement that "the Commission has been unable to obtain voluntary compliance with this subchapter", which is the language of the statute.

On July 14, 1970, Marina filed in this Court the "notice" from EEOC and an application for appointment of counsel and for leave to proceed without prepayment of fees, costs, etc. On the same day Chief Judge Sugarman made an order authorizing Marina to proceed without prepayment, etc. While no written order appears to have been made, an attorney for Marina was also appointed.

The action was commenced on August 10, 1970. It does not appear likely that the EEOC "notice" could have been received (if sent by mail) by Marina before July 10, 1970 and the action was (barely) commenced within the 30 day limit.

Meanwhile, the Division was continuing its efforts to enforce the September 23, 1969 order of the Commissioner embodying the stipulation of settlement. It filed a second petition with the Appellate Division, First Department. On September 29, 1970, the Appellate Division denied the petition and again remanded the matter to the Division of

Human Rights. The court found that the record did not comply with its earlier decision, which contemplated "an adversary hearing" and "a proper record". *State Div. of Human Rights* v. *Union Carbide Corp.*, 35 A.D.2d 664, —— N.Y.S.2d ——.

Presumably the State Division of Human Rights is currently in the process of making "a proper record".

A.

Proceedings under the state law were commenced on December 26, 1968. The effective date of this state law (N.Y. Executive Law § 296(1)(a)), as to the discrimination of which Marina complained, was September 1, 1965 (L. 1965, c. 516, § 1).

A charge could not be filed by Marina with EEOC *before* the expiration of 60 days after the commencement of the state proceedings. Such is the plain language of 42 U.S.C. § 2000e-5(b). Congress deliberately chose this method for policy reasons, namely, "to keep primary, exclusive jurisdiction in the hands of the state commissions for a sufficient period of time to let them work out their own problems at the local level". 110 Cong. Rec. 13087 (1964).

When the charge was filed by Marina only 4 days after commencement of the state proceedings, this was in violation of the statute. The federal commission was without authority to receive it and without jurisdiction to act on it.

The suggestion may be made that if EEOC in fact does not exercise jurisdiction until after sixty days from commencement of the state proceedings, the policy of the Act is observed although the statute has been violated. This suggestion was rejected in *Love* v. *Pullman Company*, 400 F.2d 49, 57-58 (10th Cir. 1969, on rehearing 1970, Fahy, C.J. dissenting).

> "This ["Thus" is evidently meant] without further word or act by the complainant to permit the EEOC to then 'automatically' assert jurisdiction after sixty days does not comply with the Act as described in the prior opinion."

The situation in the case at bar seems indistinguishable from that in *Washington* v. *Aerojet-General Corp.*, 282 F. Supp. 517 (C.D. Calif. 1968) where the action was dismissed. The Court said (at 522):

> ". . . in either event plaintiff acted and brought his case before the EEOC at a date which was impermissible under Section 706(b), 42 U.S.C.A. § 2000e-5(b). We must conclude that plaintiff filed no timely charge with the EEOC and he may not maintain his present suit."

B.

As related, some time before EEOC sent the purported statutory notice to Marina and before this action was commenced, Marina and Carbide had entered into a stipulation of settlement which was later made an order of the state commissioner. This seems clearly an election of remedies or res judicata or both.

If a charge is filed with EEOC not too soon (42 U.S.C. § 2000e-5(b)) and not too late. (42 U.S.C. § 2000e-5(d)), thereafter the federal commission and the state commission have concurrent jurisdiction and there may be two proceedings, at least for some period of time. But when one proceeding has gone to judgment, the other proceeding must come to an end. It would be wasteful thereafter to continue the two rival proceedings, not only wasteful, but an unfair burden on the defendant. Such seems to be the

basis for the dictum in *Penn. Co. v. Pennsylvania*, 294 U.S. 189, 195 (Stone, J., 1935): " . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other.

In the case at bar, the commissioner's order of September 23, 1969 is the equivalent of a final judgment. There could be no appeal by any party because it was entered on consent of all parties. The fact that the judgment is entered on consent does not detract from its effect as res judicata. Such seems so clear that statements in opinions are hard to find. The principle is implicit, however, in *Chicot County Drainage Dist. v. Baxter State Bank*, 388 U.S. 371 (1940) and *O'Rourke v. Merry Queen Corp.*, 370 F.2d 781, 783 (2d Cir. 1967). See also 56 C.J.S. 55.

The same result seems required under the principle of election of remedies. Marina voluntarily entered into a settlement with Carbide in the state proceeding. She thereby elected to enforce her rights in the state proceedings rather than before EEOC or in this Court. On indistinguishable facts, this was the conclusion in *Washington v. Aerojet-General Corp.*, above cited, at 522-523 where the Court said:

> "Initially he may pursue his remedies in both forums but at some point a choice must be made. This point, as in the case of concurrent jurisdiction between State and Federal courts, is reached when a litigant has pursued his remedies in one forum to decision, be it by settlement, the decision of an arbitrator, or the decision of a judge. Such a rule is not only consonant with that applied in an analogous area, but also will contribute to the expeditious resolution of disputes in

the equal employment area and promote the sound and equitable administration of justice, by precluding an aggrieved party from subjecting a defendant to multiple actions based upon the same claim."

If there were an attack of some sort on the September 23, 1969 order of the commissioner, perhaps the principle of election of remedies would be inapplicable. There is no attack on the order, however; to the contrary, every reliance is being placed on that order and it is at present the subject of proceedings to enforce it. Congress could not have intended that an action be maintained in this Court after relief had been obtained by way of an order in the state proceeding.

Matters outside the pleading having been presented to and not excluded by the Court, the motion is treated as one for summary judgment. Fed. R. Civ. P. 12(b).

The motion of defendant, treated as one for summary judgment, is granted and the Clerk is directed to enter judgment for defendant dismissing the action.

So Ordered.

Dated: New York, New York
December 7, 1970

Inzer B. Wyatt
United States District Judge

Opinion Dated January 11, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 3435

MARINA VOUTSIS,

Plaintiff,

—v.—

UNION CARBIDE CORPORATION,

Defendant.

This is a motion by plaintiff (Marina) for reargument of a motion by defendant (Carbide) which was treated as one for summary judgment and granted by order, with memorandum opinion, filed December 7, 1970.

The materials now submitted for plaintiff, including two affidavits and a memorandum of law, have been considered and are directed to be filed. There is nothing which would change the result reached.

Among other things, regulations of EEOC are cited which provide in substance that where (as in the case at bar) a charge is filed with EEOC *too soon*, EEOC will wait sixty days and will *then* "consider the charge to be filed with the Commission". But the date of the filing of a charge is not a matter to be determined by the mental operations of those in the EEOC organization; it is an objective fact, provable by evidence, and at latest is the

date on which the charge is *received* by EEOC. Indeed, such is the opinion of the General Counsel of EEOC as quoted in *Washington v. Aerojet-General Corp.*, 282 F. Supp. 517, 521 (C.D. Calif. 1968). It is stated by counsel for plaintiff that the result is "patently absurd" and a "technicality" because, regardless of *how soon* the charge is filed with EEOC, if in fact EEOC defers any action for 60 days the policy of the legislation is achieved. This may well be true but Congress has been specific in the relevant provision: "No charge may be filed . . . by the person aggrieved before the expiration of sixty days after . . ." etc. The Court is not free to disregard these plain words.

It appears that while Marina swore to her charge on December 30, 1968 it was received by EEOC on January 6, 1969 and the latter date is undoubtedly the date of filing but is still much too early to be in compliance with the statute. It may be noted that when the charge was received by EEOC on January 6, 1969, a file number (TNY 9 0385) was assigned to it.

The motion for reargument is granted and on reargument the Court adheres to the decision made.

So Ordered.

Dated: January 11, 1971

Inzer B. Wyatt
United States District Judge

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 21 1972
MICHAEL RODAK, JR., CLERK

No. 71-1113

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNION CARBIDE CORPORATION, PETITIONER,

v.

MARINA VOUTSIS, RESPONDENT

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

DAVID L. NORMAN,
Assistant Attorney General,

WALTER W. BARNETT,
Attorney,
Department of Justice,
Washington, D.C. 20530.

JOHN DEJ. PEMBERTON, JR.,
Acting General Counsel,
Equal Employment Opportunity Commission,
Washington, D. C. 20506.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1113

UNION CARBIDE CORPORATION, PETITIONER,

v.

MARINA VOUTSIS, RESPONDENT

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 452 F.2d 889. The opinions of the district court (Pet. App. 28a-37a) are reported at 321 F. Supp. 830 and 321 F. Supp. 834.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1971. The petition for a writ of certiorari was filed on March 2, 1972. The judisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding that an individual is not foreclosed from invoking federal administrative and court remedies under Title VII of the Civil Rights Act of 1964 by having initially pursued state remedies that had proven to be lengthy and had not resolved the controversy.

STATUTORY PROVISIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), is reprinted as an Appendix to this brief.

STATEMENT

Respondent filed a complaint with the New York State Division of Human Rights on December 26, 1968, alleging unlawful discrimination in employment opportunities by her employer on account of sex (Pet. App 14a). Four days later, she filed a written charge with the Equal Employment Opportunity Commission, a federal agency created by Title VII of the Civil Rights Act of 1964 to receive complaints of unlawful employment practices, investigate, and, if ap-

propriate, attempt conciliation (Pet. App. 30a). 42 U.S.C. 2000e-4, 2000e-5.

During the course of the state proceedings, respondent entered into a stipulation of settlement with her employer, petitioner Union Carbide. In this settlement, Carbide agreed to offer her employment in a suitable administrative position. The State Human Rights Division approved the stipulation of settlement and adopted it in a formal order (Pet. App. 14a-16a).

Eight months later, respondent filed a second complaint with the state agency alleging that Carbide had not complied with the terms of the "settlement" (Pet. App. 14a-16a). After determining that Carbide had in fact not complied, the state agency sought to enforce the stipulation in state court. The New York courts twice denied the state agency's petition for enforcement of the settlement and remanded the matter to the agency for the purpose of making a record regarding Carbide's alleged failure to comply.[1]

Eighteen months after respondent had filed a written charge with the EEOC, EEOC sent her a notice of her right to sue within 30 days, pursuant to 42 U.S.C. 2000e-6(e). This action was then commenced.

On December 7, 1970, the district court granted Carbide's motion for summary judgment and dismissal of the employee's Title VII complaint for failure to

---

[1] *State Division of Human Rights* v. *Union Carbide Corp.*, 310 N.Y.S.2d 396 (Sup. Ct. A.D.); *State Division of Human Rights* v. *Union Carbide*, N.Y. Sup. Ct. A.D., decided September 29, 1970.

state a claim, on the grounds that she had filed her charge with EEOC before the 60-day period for referral to state agencies had expired, and that she had foreclosed any federal action by electing to pursue her state remedies (Pet. App. 28a-37a). The court of appeals reversed on both grounds and remanded the case to the district court (Pet. App. 1a-9a).[2]

After the decision of the court of appeals, the state agency issued an order finding the employer in violation of the original stipulation of settlement for a limited period.

ARGUMENT

Petitioner asks this Court to review a decision of the court of appeals holding that an individual is not foreclosed from pursuing a remedy granted by Title VII of the Civil Rights Act of 1964 because she pursued remedies under analogous state statutes where the state remedies had proven to be lengthy and inadequate. The decision below is in accord with the language and purpose of Title VII and does not give rise to any conflict among courts of appeals. Accordingly, review by this Court is unwarranted.

1. The court of appeals decided that respondent could maintain a suit under Title VII because the

---

[2] The EEOC, which had appeared *amicus* in the district court, was permitted to intervene in the court of appeals (Pet. 4).

[3] The order found Carbide in violation during the period from September 11, 1969, and up to November 19, 1969 (Pet. App. 19a).

settlement, into which the parties had entered before the state agency, was "vague" and unresolved "despite two appeals and an elapsed time of more than two years" (Pet. App. 7a). In holding that resort to the remedy provided by federal statute is appropriate if the state remedy is found wanting, the court of appeals relied on the congressional policy reflected in the Act's authorization of private litigation as a federal remedy to alleviate unlawful employment discrimination on a class basis. See, *e.g.*, *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 30-34 (C.A. 5). This holding is in accord with the language[4] and express legislative history[5] of the Act, which contemplates resort to federal machinery if, after a fixed period of time, state enforcement has not resolved the dispute. Cf. *Love* v. *Pullman Co.*, Nos. 70-5033 and 70-37, decided January 17, 1972.

Petitioner suggests that the pursuit of both state and federal remedies discourages and subverts voluntary settlements and tends to cast the entire burden of litigation in this field on the federal courts (Pet. 8-9). Whatever the merit of these considerations where a settlement was consummated or where other remedies under state law were effective, that is not this case because here the machinery available for resolution of the complaint on the state level had provided neither prompt nor complete relief when the matter came be-

---

[4] See Section 706(b), of the Act, 42 U.S.C. 2000e-5(b), reprinted in the Appendix hereto.

[5] See, *e.g.*, 110 Cong. Rec. 13087 (Senator Dirksen).

fore the district court and the court of appeals.[6] At the time of the decision of the court below, the state agency had not yet made its findings regarding whether Carbide had failed to implement the settlement (Pet. 6; Pet. App. 14a-19a). The court of appeals therefore expressly reserved decision on the "question whether [respondent] could, without the federal commission's consent, bind herself to a settlement after filing her federal complaint" because "here * * * no settlement has been effectuated with or without EEOC consent" (Pet. App. 9a).

2. Petitioner cites *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (C.A. 6), affirmed by an equally divided Court, 402 U.S. 689, in an attempt to show a conflict among the courts of appeals. But in two decisions after this Court's affirmance of *Dewey* without opinion, the Sixth Circuit has made clear that *Dewey* precludes federal court litigation of claims for which other remedies were sought only in those instances where the federal remedy was not invoked until the other procedure was "totally complete." *Spann* v. *Kaywood Division, Joanna Western Mills Co.*, 446 F.2d 120, 123 (C.A. 6); *Newman* v. *Avco Corp.*, 451 F.2d 743, 749 (C.A. 6). Moreover, as the district court below acknowledged, Title VII envisions circumstances where "the federal commission and the

[6] As the order of the State Division of Human Rights makes clear, petitioner was in breach of its settlement agreement, and that agreement was never consummated. Petitioner has determined not to appeal from that ruling (Pet. App. 20a-21a).

state commission have concurrent jurisdiction and there may be two proceedings" (Pet. App. F, 33a).

The court of appeals here expressly recognized that the grant of some relief in one proceeding would bar duplicate relief if this would result in unjust enrichment (Pet. App. A, 7a). Thus, the effect, if any, of the state agency's later finding that Carbide had not carried out the settlement agreement is to be determined by the district court on remand from the court of appeals in light of the relevant EEOC regulation (29 C.F.R. 1601.9). Accordingly, the decision below protects petitioner against multiple liability and, at the same time, fulfills Congress' intent to allow vindication of important public policies in class actions such as this,[7] and to provide individuals, such as respondent, with a prompt and effective remedy.[8]

---

[7] See *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32-33 (C.A. 5).

[8] The decision below is fully consistent with the decisions of other courts of appeals in cases involving dual or parallel proceedings. See, *e.g.*, *Bowe* v. *Colgate-Palmolive*, 416 F.2d 711, 714-715 (C.A. 7); *Hutchings* v. *United States*, 428 F.2d 303 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DAVID L. NORMAN,
Assistant Attorney General.

WALTER W. BARNETT,
Attorney.

JOHN DEJ. PEMBERTON, JR.,
Acting General Counsel,
Equal Employment
Opportunity Commission.

APRIL 1972.

APPENDIX

Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b):

> Sec. 706. (b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 483461 869

LIBRARY
SUPREME COURT, U.S.
APR 29 1972
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1113

UNION CARBIDE CORPORATION,

Petitioner,

—against—

MARINA VOUTSIS,

Respondent,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

DAVID L. BENETAR
ARANOW, BRODSKY, BOHLINGER, BENETAR, EINHORN & DANN
469 Fifth Avenue
New York, New York 10017
Counsel for Petitioner

STANLEY SCHAIR
RICHARD P. LAWLOR
KATHRYN E. ZENOFF
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1113

UNION CARBIDE CORPORATION,

Petitioner,

—against—

MARINA VOUTSIS,

Respondent,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

I.

The memorandum submitted by EEOC and relied upon by respondent[1] predicates its main opposition to the petition herein upon a protestation that there is in fact no conflict between the decision below and the line of Sixth Circuit decisions headed by *Dewey* v. *Reynolds Metal Co.*[2] The attempted denial does not withstand analysis.

---

[1] The Court was evidently notified of such reliance by a letter from respondent's counsel dated April 24, 1972.

[2] 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 400 U.S. 1008 (1971), *aff'd per curiam without opinion*, 402 U.S. 689; *Spann* v.

The EEOC extracts and pinpoints the phrase "totally complete" from the following paragraph in *Spann*:

> "We hold only that where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete *Dewey* precludes judicial cognizance of the complaint."

It then suggests that the State agency proceedings herein asserted as a bar were not "totally complete" prior to the commencement of the district court action and presumably, therefore, the decision below is not in conflict with the *Dewey, Spann* and *Newman* decisions of the Sixth Circuit.

But the State agency proceedings here *were* "totally complete" when the district court action was commenced and in precisely the same sense in which the Sixth Circuit used that phrase. A decision of the Sixth Circuit dated March 3, 1972 (*Thomas* v. *Carey Mfg. Co.*, —— F.2d ——, 4 FEP Cases 468) emphasizes this fact and drives home with added force the showing of conflict made in the petition herein at pages 11-14.

The principal operative fact relied on by the court in *Thomas* to bar the Title VII action there was that "the filing of the action in the District Court was preceded by the filing and processing of a grievance through the arbitration proceeding provided by the collective bargaining agreement" between the parties. Thus the Sixth Circuit found that the conduct of the arbitration proceeding to decision was sufficient to bar any subsequent federal court action predicated on the same claim.

Kaywood Div., Joanna Western Mills Co., 446 F.2d 120 (6th Cir. 1971); *Newman* v. *Avco Corp.*, 451 F.2d 743 (6th Cir. 1971). See also *Thomas* v. *Carey Mfg. Co.*, —— F.2d ——, 4 FEP Cases 468 (1972).

The facts at bar present a parallel situation. It is undenied in EEOC's memorandum that by the time the district court action was commenced on August 10, 1970 (1) the respondent's discrimination claim at the State agency had been settled by the execution of a stipulation by the parties on August 12, 1969, (2) the settlement had been embodied in a formal order of the agency's Commissioner on September 23, 1969, and (3) the Company had complied in all major respects with said order and settlement on November 19, 1969.[3] All State proceedings which occurred subsequent to November 19, 1969, were triggered by respondent's refusal to accept the Company's compliance with its obligation under the settlement (fulfilled on November 19, 1969) to make an offer to respondent of a job of the kind described therein. Thus it is clear that the State agency proceedings on respondent's discrimination claim against Union Carbide were "totally complete" prior to the institution of the federal court action on August 10, 1970.[4]

II.

In the short period between the filing of the petition herein and the service of the memorandum in opposition, at least two additional court decisions were reported con-

---

[3] As noted both by the EEOC in its memorandum and by Union Carbide in its petition, the Company was later found in violation of the settlement for a limited period between September 11, 1969 and November 19, 1969. The State agency, however, awarded damages to respondent for that limited period and the Company has tendered performance of that obligation.

[4] Respondent's rejection of the Company's job offer and back pay tender made in compliance with the parties' settlement and the enforcement order of the State agency is indistinguishable from the grievants' rejection of the arbitrators' awards in *Spann* and *Thomas*.

cerning the application of the doctrines of collateral estoppel, election of remedies, or *res judicata* in Title VII suits. These decisions serve to widen the already existing conflicts among the courts in this area and to make even more urgent their resolution by this Court. The Sixth Circuit's decision in *Thomas*, discussed above, was one of them. The other is a decision by the United States District Court for the Western District of Tennessee. *Taylor* v. *Springmeier Co.*, —— F. Supp. ——, 4 FEP Cases 322 (1971). There the court held that a Title VII action based on an alleged discriminatory discharge of a Negro employee was barred under the doctrine of election of remedies since the discharged employee's grievance was finally determined adversely to him after a full hearing by a grievance committee.

In this connection it is significant, we submit, that the existence of the conflicts discussed in the petition herein (pp. 14-18) between the court below and other federal courts in applying the doctrines of election of remedies and *res judicata* in Title VII cases is not challenged or disputed by the EEOC in its memorandum.[5]

---

[5] The case of *Jenkins* v. *United Gas Co.*, 400 F.2d 28 (5th Cir. 1968), cited by EEOC in its memorandum, serves, if at all, only to highlight the conflict among the circuits. That case involved the issue of mootness and did not anywhere in the court's holding or in dicta touch upon the issues involved herein of collateral estoppel, election of remedies and *res judicata*. But to the extent EEOC would have us read that case to require the continuation of a federal court proceeding under Title VII in a case where the underlying discrimination claim had been disposed of *prior* to the commencement of the federal court action, as it had been here, it is in direct conflict with the Sixth Circuit's decisions in *Dewey, Spann, Newman* and *Thomas* and with the district court decisions discussed on pages 14-17 of the petition herein.

Moreover, the memorandum in opposition implicitly recognizes the force of the Company's argument that pursuit of federal remedies in cases such as the one at bar discourages and subverts voluntary settlements and tends to cast the burden of litigation in this field on the federal courts (Mem. in Opp., p. 5). The EEOC, however, seeks to sweep this argument aside by suggesting that this result will not flow from the decision hereinbelow because the settlement in this case was "vague," not "consummated" or "unresolved"; and the remedy was not "effective" or "found wanting"; and the State had not provided "prompt" or "complete relief."

These characterizations cannot hide the plain facts, undisputed and undenied in EEOC's memorandum, that prior to federal court action a settlement of the discrimination claim was voluntarily made by the employee, that she had obtained enforcement of that settlement by the State agency and that the agency has found, after an adversary hearing, that the Company had complied with the settlement by its job offer made on November 19, 1969. To the minor extent that it had not, damages were awarded and their payment to respondent was tendered.

Surely the need for an authoritative resolution of the conflicts we have pointed out is presented by this case. And an authoritative determination as to whether the floodgates of duplicative and second-chance litigation—already foreshadowed in the proliferating lawsuits discussed in this application—seems likewise urgently needed.

CONCLUSION

For these reasons and those set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DAVID L. BENETAR
ARANOW, BRODSKY, BOHLINGER, BENETAR, EINHORN & DANN
469 Fifth Avenue
New York, New York 10017
Counsel for Petitioner

STANLEY SCHAIR
RICHARD P. LAWLOR
KATHRYN E. ZENOFF
Of Counsel

April 27, 1972